



CULTURAL RESOURCE PROTECTION

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Road Map to Protecting Cultural Resources in California

- What is a cultural resource?
- Where do the Feds, State, and Tribal governments have authority
- Which laws have an impact on state projects?
 - *Tribal Ordinances*
 - *Native American Grave Preservation and Repatriation Act*
 - *California Senate Bill 18*
 - *California Environmental Quality Act*
 - *Assembly Bill 52*

WHAT ARE CULTURAL RESOURCES?

The legal definitions

Legally Defining Cultural Resources - Cal. Pub. Res. Code § 21074

- (1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a Tribe that are either included or determined to be eligible for inclusion in the California Register of Historical Resources; or included in a local register of historical resources; or a resource determined by the lead agency - in its discretion and supported by substantial evidence - to be significant pursuant to criteria set forth to be eligible to be listed as a historical resource in the California Register;
- (2) a cultural landscape that meets the criteria set forth above to the extent that the landscape is geographically defined in terms of the size and scope of the landscape; or
- (3) a historical resource; or a unique archaeological resource; or a “non-unique archaeological resource” if it conforms with the criteria in section 1 above. When determining the significance of the evidence, the lead agency shall consider the significance of the resource to the Tribe

Sacred Sites

Sacred sites include areas of cultural significance that are still used today.

The details on these locations are sometime kept intentionally secret and require strict confidentiality.

The important activities associated with sacred sites include religious ceremonies, growing of important plants for medicinal and religious purposes, and as a revered place in connection with creation or other significant moments in a tribe's history/religious tradition.

WHO HAS AUTHORITY?

Federal, State, and Tribal Jurisdiction

General: Federal vs. State Jurisdiction

California

- State Highway Construction
- State Park Improvements
- County Development Projects

Federal

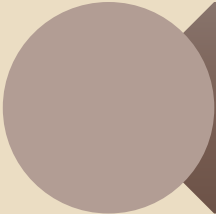
- National Parks
- Military Property
- Native American Reservations

What is Indian Country?

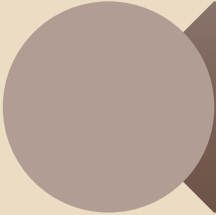
- Often the term “Indian Country” is used when discussing jurisdiction. It is an actual legally defined term.
- Indian Country is defined as :
 - *all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,*
 - *all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and*
 - *all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same*

18 U.S.C. § 1151

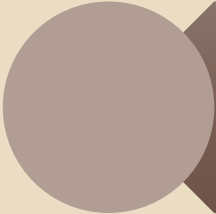
Tribal Jurisdiction



Public Law 280 provides for tribal jurisdiction for civil regulation over activities on tribal land.



Many tribes have cultural resource protection ordinances that include a detailed process for contacting the tribe before development work can begin, how to contact the Tribal Historic Preservation Office, and attached fines and penalties for violation of the ordinance.



If a project is close to a Reservation or Trust Land, a tribal cultural resource protection ordinance may apply.

THE TWO NAGPRA

Federal and Cal-NAGPRA

Native American Grave Protection and Repatriation Act (NAGPRA)

Federal

- Focus on institutions, including government agencies, that receive Federal funding.
- Enacted in 1990
- Federally Funded

Cal-NAGPRA

- California Health and Safety Code Section 8011.
- Designed to be consistent with the federal NAGPRA.
- State funded

Federal NAGPRA

- In general, NAGPRA authorizes tribal governments and organizations to claim possession of human remains and cultural items from public museums and agencies.
- NAGPRA applies to an institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.
- NAGPRA applies both when there is an intentional excavation or an inadvertent discovery on federal or tribal land.

Special Federal NAGPRA Definitions

■ “Cultural Items”

- *Associated funerary objects*
- *Unassociated funerary objects*
- *Sacred objects*
- *Cultural patrimony, something important to the whole culture and not to any one individual.*

25 USC § 3001(3)

■ “tribal land”

- **(A)** *all lands within the exterior boundaries of any Indian reservation;*
- **(B)** *all dependent Indian communities;*
- **(C)** *any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.*

25 U.S.C.A. § 3001(15)

Repatriation

If a Most Likely Descendent (MLD) requests return of Native American remains, then the possessor of those remains must expeditiously return them at the place and in the manner prescribed by the tribe.

Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this chapter, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.

25 U.S.C. § 3005

Inventory Consultation Requirements

1. Completed in consultation with tribal government officials and traditional religious leaders.
2. Provide documentation upon request from a federally recognized tribe that includes inventories, studies, or other pertinent data for the purpose of determining geographical location, cultural affiliation, and the basic facts surrounding the acquisition of the Native American human remains and associated funerary objects.
3. Notice to the affected Indian tribes is required 6 months after the inventory is completed.

Cal-NAGPRA

- Enacted in 2001 to mirror the federal NAGPRA
- Covers state and local government lands
- Expands coverage beyond federally recognized tribes to non-federally recognized California tribes.
- Creates a mechanism for seeking the assistance of the Native American Heritage Commission

Eligible Non-Federally Recognized Tribes

- The Tribe must be “indigenous to the territory that is now known as the State of California. Ca; Hlth. & S. § 8012(j)(2)
- The Tribe must be listed on the BIA BAR petitioner list, pursuant to 25 CFR 82.1, which includes tribes seeking recognition and those that were declined.
- The Tribe is subject to the discretion of the Repatriation Oversight Commission that looks at factors such as:
 - *A continuous identity as an autonomous and separate tribal government*
 - *Demonstrated aboriginal ties to California and the member can demonstrate lineal descent from the identifiable earlier groups that inhabited a particular territory.*
 - *Recognition by the Indian community and demonstrated membership criteria*

Enforcement

NAGPRA

Civil penalties from the Department of the Interior

Private suit in Federal District Court

Cal-NAGPRA

Repatriation Oversight Committee may levy a civil penalty

No private cause of action

Underfunded

Recap of the Two NAGPRA

Federal NAGPRA



Cal-NAGPRA



SB 18 CONSULTATION

Building Relationships Between
Local and Tribal Governments

SB 18 Application and Triggers

The law applies to

- Native American Heritage Commission listed California tribes
- local governments that
 - adopt or amend general plans or specific plans
 - create open space designations.

Consultation Considerations

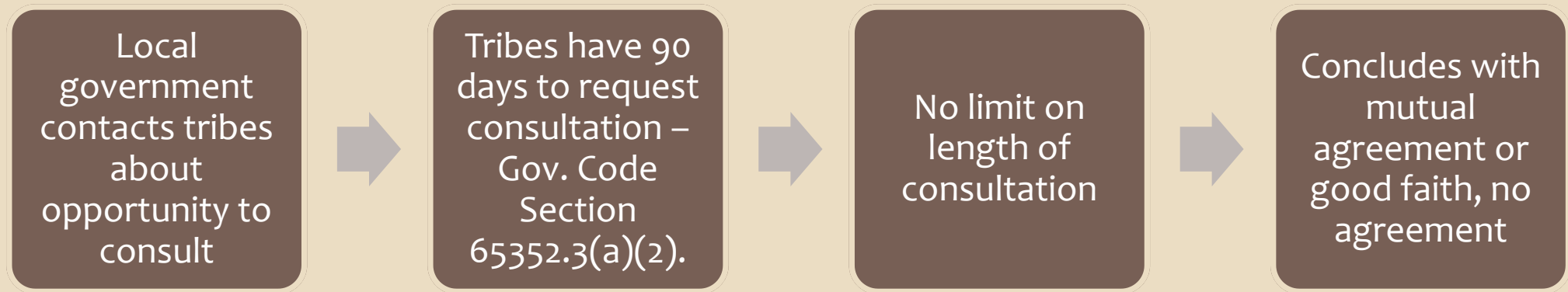
Has very strict consultation requirements for cities and counties when they make amendments to or update their “General Plans”

Some private projects require the county to make a special amendment to the General Plan in order to accommodate the project. Arguably this special amendment process triggers SB 18 consultation

The County must contact the Native American Heritage Commission and obtain the names of all the tribes in the project area that need to be contacted and consulted

The purpose of the consultation is to determine the tribes’ concerns and if possible to eliminate or mitigate the concerns

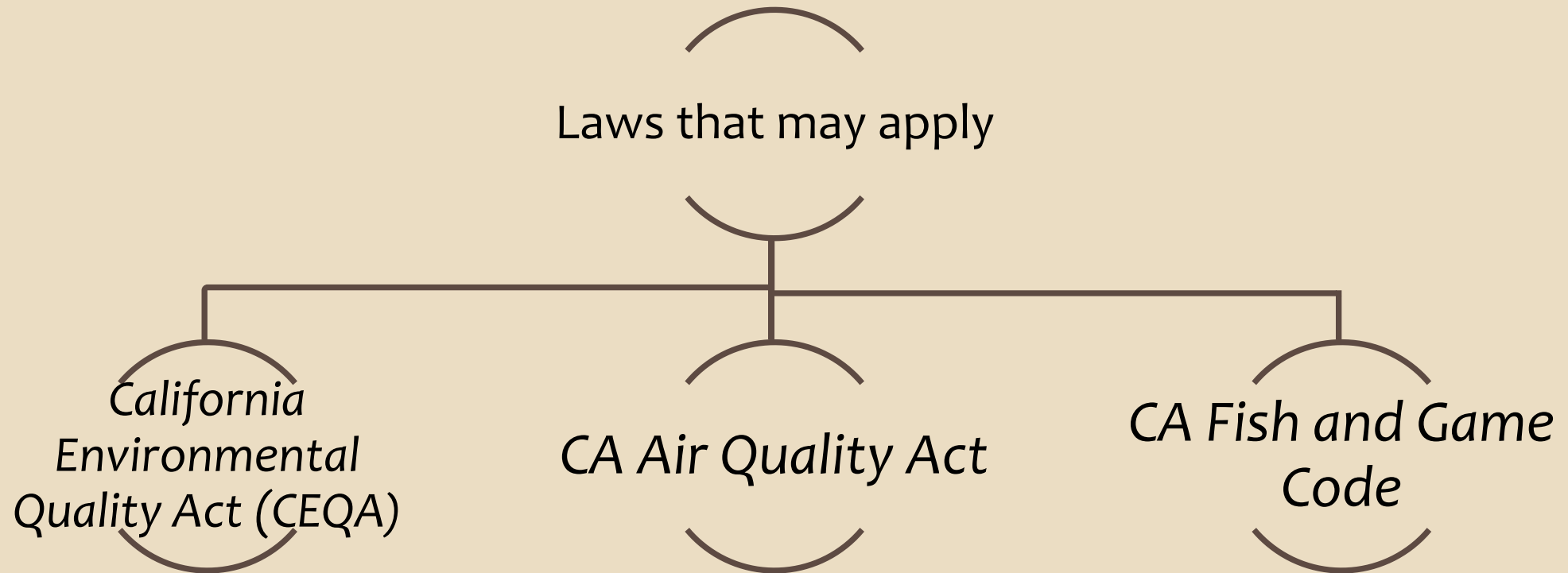
SB 18 Consultation



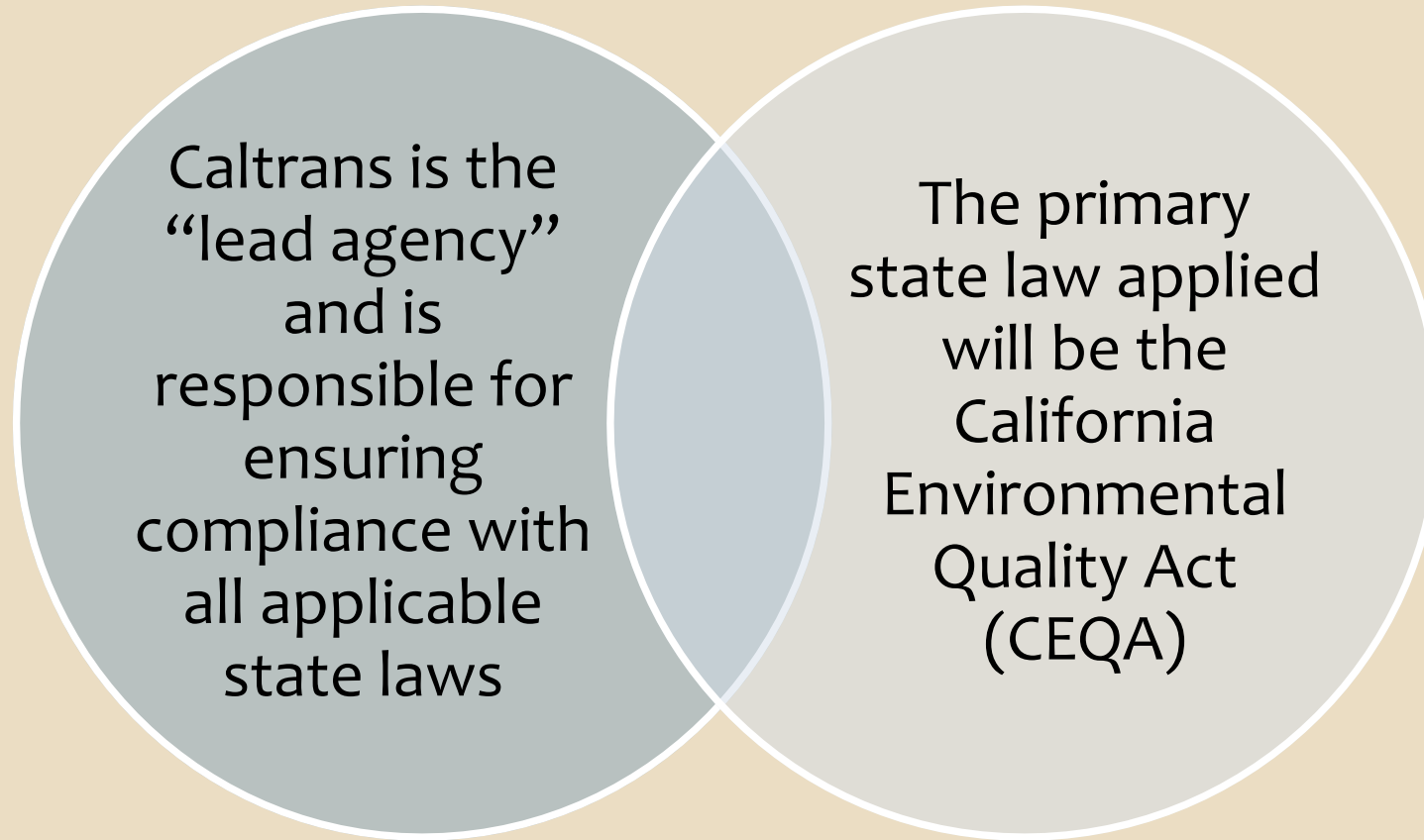
CEQA

Protection of the Environment is Protection of Cultural Resources

Caltrans Proposal to Widen a State Highway



Caltrans Proposal to Widen a State Highway



The California Environmental Quality Act

- There is no affirmative duty to contact a tribe (but see AB 52).
- However, CEQA guidelines encourage consultation with general public or organizations who have concerns with the project.
- CEQA requires the lead agency evaluate the impacts that proposed project will have on the environment.

Purpose of CEQA

- inform decision-makers and the public about any potential significant environmental effects of a project;
- identify ways that environmental damage can be avoided or significantly reduced from the project;
- prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds feasible alternatives; and
- disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.

Responsible Agencies

Although Caltrans is the “lead agency” there also “responsible agencies”



“Responsible agencies” are state agencies that have some authority over certain aspects of the project and they need to issue a permit or license for the project.

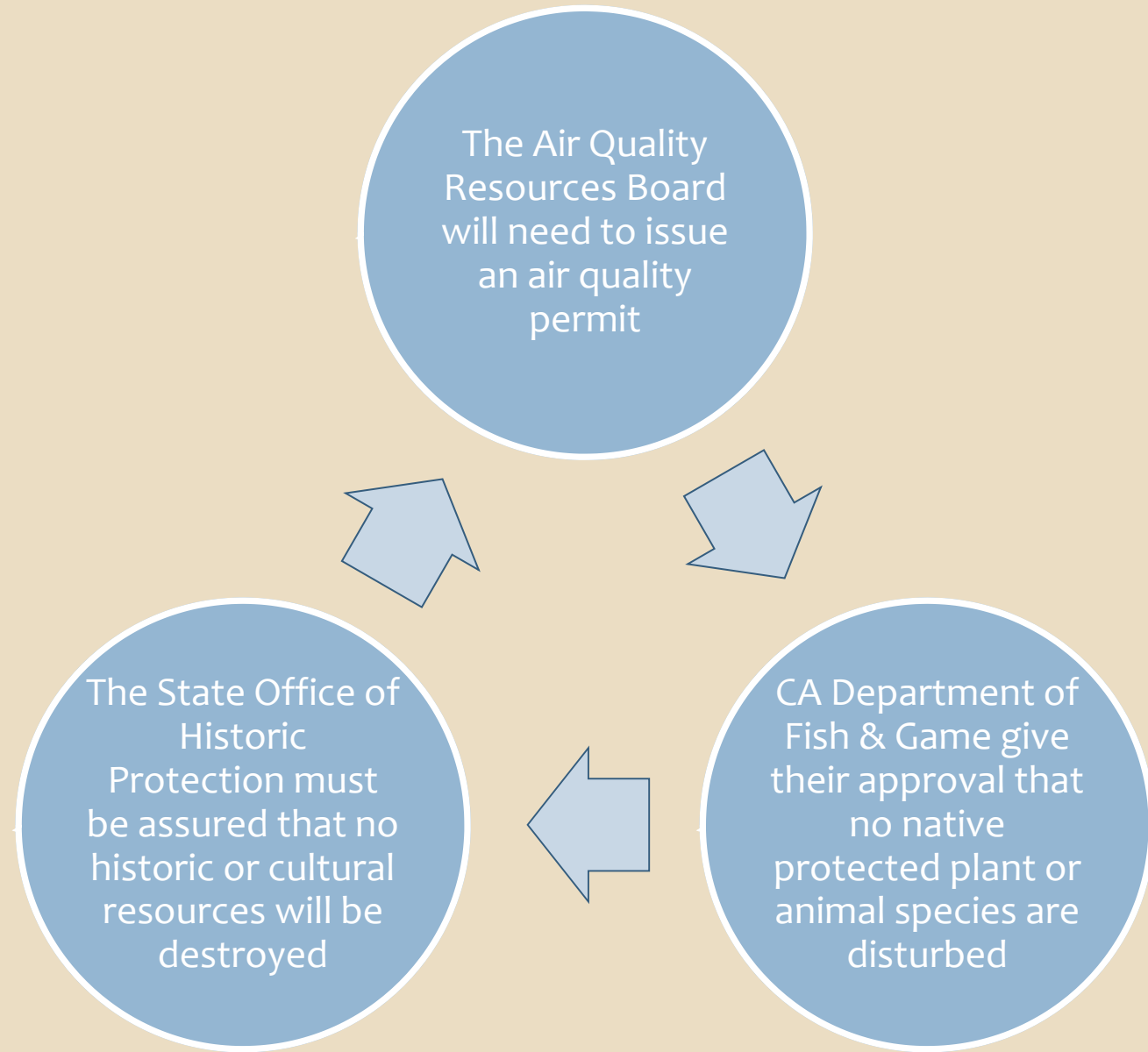
Notice of Preparation

When the lead
agency is a
state agency

- They must submit a “Notice of Preparation” to the State Clearinghouse and Planning Unit;
- which is responsible for making sure all “responsible parties” are notified and provide information to the lead agency on the project

Example

the Caltrans
project
“responsible
agencies” would
be:



Categorical Exemptions

Categorical
exemptions may
exclude project from
CEQA review process.



There are exceptions
to the exemptions!

Impacts



Impacts that are not significant

Agency will issue a “negative declaration” saying the project can move forward without further environmental review

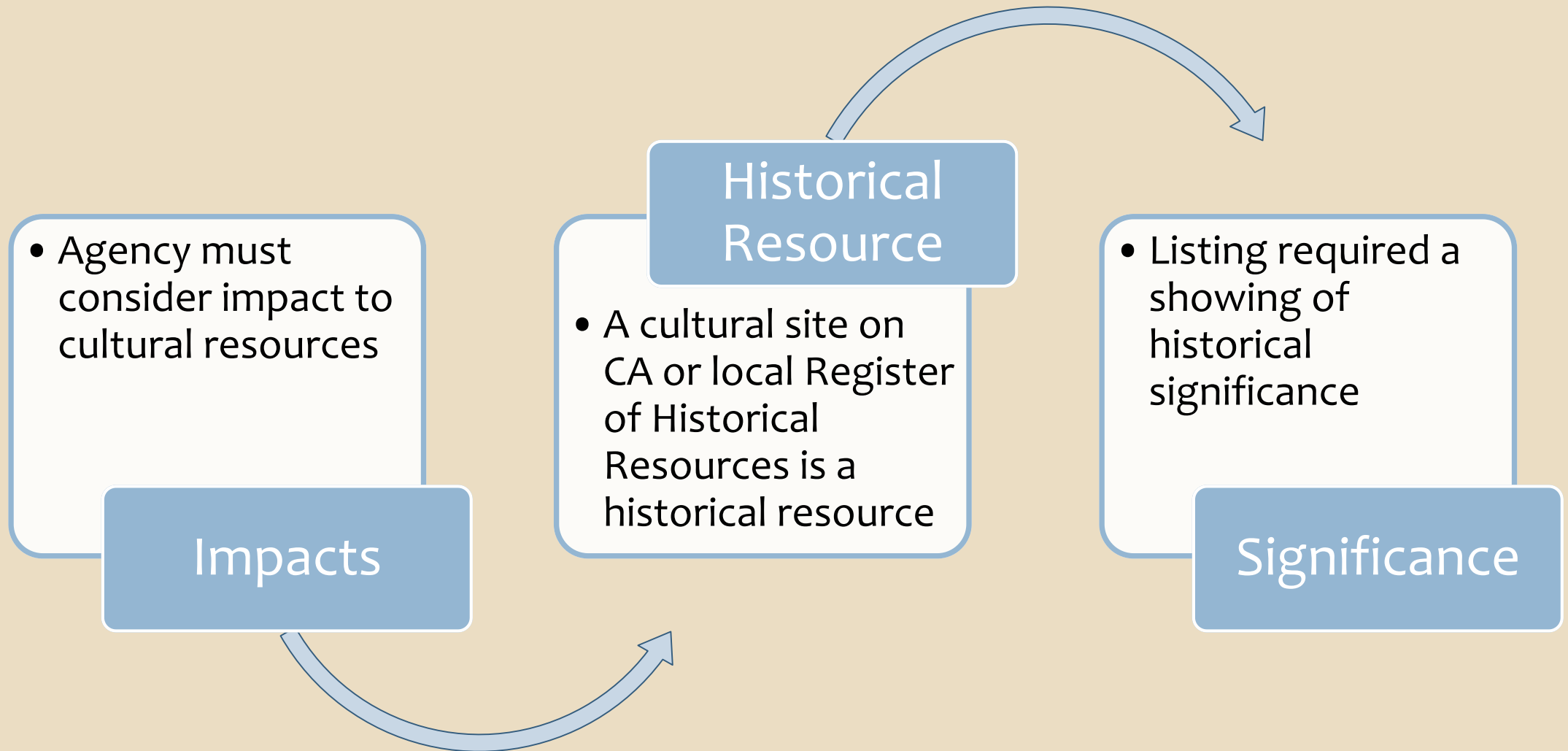
Significant Impact

If the impacts are “significant” then the agency must do a more in depth evaluation of the impacts and issue a “Environmental Impact Report” (“EIR”)

Significant but...

If there are significant impacts but they can be eliminated or mitigated a “mitigated negative declaration” can be issued

Initial Study



Consultation

It is within the lead agency's discretion to determine if the site is "historically" significant.

Consultation must be made with the State Historic Protection Office or "SHPO" and tribe

If found to be historic and impacted an EIR will be found to be necessary

Unique Site

A site might also be deemed an “archaeological site” (but see AB 52 – differentiation guidance by 2016)

CEQA distinguishes between “unique” and “nonunique” archaeological resources

If unique and there will be significant impacts then an EIR must be done and impacts mitigated

If nonunique then a negative declaration will be issued.

Environmental Impact Report

If an EIR is required there is a scoping process to determine the scope of the EIR and what will be evaluated

If no impacts were determined in some areas there may be little evaluation of them in the EIR

Appendix G

Tribal Cultural Resources are included in the checklist on Appendix G for CEQA compliance use that sets tribal cultural resources out as a separate and significant consideration.

<http://resources.ca.gov/ceqa/docs/ab52/final-approved-appendix-G.pdf>

Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
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XVII. TRIBAL CULTURAL RESOURCES.

Would the project cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:

a) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or

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b) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code Section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resources Code Section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.

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Tribal Cultural Resources

Separate considerations when determining the impact of a project

Environmental Impact Report

The EIR
generally
evaluates the
project impacts
in the following
areas:

- *Aesthetics*
- *Biological Resources*
- *Geology and Soil*
- *Hydrology and Water Quality*
- *Land Use and Planning*
- *Traffic*
- *Cultural Resources*
- *Air Quality*

Environmental Impact Report

The EIR
must
also
analyze:

- *Direct Impacts*
- *Indirect Impacts*
- *Cumulative*

Environmental Impact Report

The EIR must set forth mitigation measures to lessen or avoid impacts—this is where most cultural sites are addressed. Depending on what is being protected, mitigation may include :

<i>Moving the project to avoid the site</i>	<i>Designating the site as open space</i>	<i>Human remains may be incased or exhumed</i>	<i>On site Native American monitors</i>	<i>Artifacts collected and turned over to the Tribe</i>	<i>Protocol for what will occur if human remains are encountered</i>
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EIR Reasonable Alternatives

The EIR must set forth “reasonable” alternatives to the project.

The alternatives are designed to offer the decision maker options that will feasibly meet most of the project’s basic objectives while reducing or avoiding any of its significant effects.

Usually there must be at least 3 and 1 is always don’t do the project

EIR Notice of Completion

When the Draft EIR is completed the lead agency files a “Notice of Completion” with the State Office of Planning and Research and notice to the public that it is available for comment (publish notice in the paper, etc.)



Sometimes a tribe is sent a copy of the Draft EIR if they have had contact with the lead agency or may request it



Comments are due within 30 to 60 days from when the EIR is released

AB 52 CONSULTATION

Added Emphasis on Building Relationships

AB 52

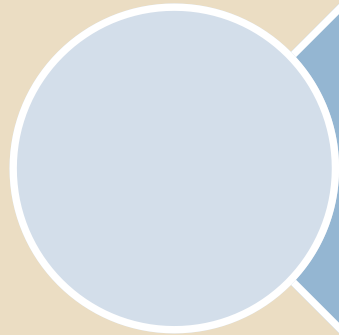
Defines “Tribal Cultural Resources”

- Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
 - *Included or determined to be eligible for inclusion in the California Register of Historical Resources.*
 - *Included in a local register of historical resources...*

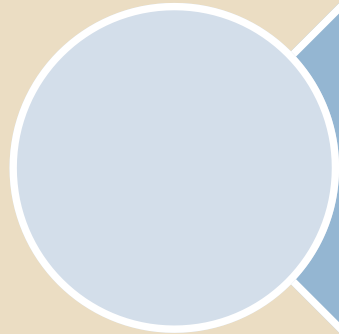
Requires consultation when Tribe notices lead agency in writing requesting consultation

- prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required
- Short turn around time (30 days)

AB 52 - Consultation



Purpose: Building relationships with lead agencies and local tribes



Avoiding inadvertent discoveries and setting up a clear process should an inadvertent discovery occur

Timeline



Tribe Requests Notification

In order to participate in AB 52 tribal consultation, a tribe must make a written request to the lead agency to be notified of projects in the geographic area with which the tribe is traditionally and culturally affiliated.

Failure to request consultation by the tribe means that the lead agency does not need to participate in AB 52 consultation, but does not preclude of the lead agency from non-AB 52 consultation. This includes the right to participate in the CEQA review process.

Notification by Lead Agency

Within 14 days of determining that an application for a project is complete or of a decision by public agency to undertake a project, the lead agency must provide a formal notification for to the designated contact of tribes that are culturally and traditionally affiliated to the project.

The written notice must include:

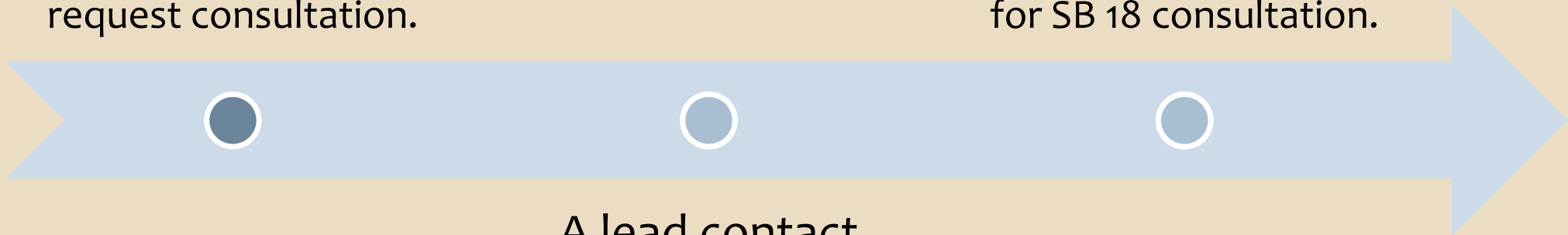
- *A brief description of the proposed project*
- *The project's location*
- *The lead agency contact information*
- *Notification that the tribe has 30 days to request consultation*

Tribe Responds Requesting Consultation

The tribe must respond in writing within 30 days of receipt of the formal notification and request consultation.

If no lead contact is designated, then the agency will use the contact person listed for SB 18 consultation.

A lead contact must be designated by the tribe.



Consultation Begins

The lead
agency
begins the
consultation
process

- *within 30 days of receiving a tribe's request for consultation and*
- *Prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report.*

Conclusion of Consultation

Consultation is considered concluded when one of the following occurs:

- *The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.*
- *A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.*

Confidentiality

Any information submitted by a tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed to the public.

- *One public agency may disclose the information to another public agency that has jurisdiction over the preparation of the environmental document – Pub. Res. C. s. 21082.3(c)(1)*

Standard of Care

- “using a reasonable degree of care.”

AB 52 increases confidentiality by

- *requiring a confidential appendix to the environmental document (unless tribes consent otherwise)*
- *Binds project proponent and consultants that participate in consultation to the same confidentiality as the lead agency*

Data not part of AB 52 Confidentiality

Publicly available information

Already in the lawful possession of the project applicant before it was provided by the tribe

Independently developed by the project applicant

Lawfully obtained by a third party

Building Working Relationships

Cultural resource protection is a crucial aspect of California's public policy to preserve the state's heritage.

This monumental task is made easier when tribes and state agencies fulfill consultation requirements not to just check a box, but to create lasting relationships to facilitate cooperation on future projects.

Thank You

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